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No. 04-5928

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Is a Mexican national entitled to a Certificate of Appealability ("COA") based upon the decision of the International Court of Justice ("ICJ") in *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. 128 (Mar. 31) ("*Avena*"), when his COA request is barred under §2253(c)(2) and §2254(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA")?

2. Is a Mexican national entitled to a COA based upon the decision of the ICJ in *Avena*, when his COA request is barred under the doctrine of procedural default as interpreted by this Court in *Breard v. Greene*, 523 U.S. 371 (1998)?

3. Is a Mexican national entitled to a COA based upon the decision of the ICJ in *Avena*, when his COA request is barred by *Teague v. Lane*, 489 U.S. 288 (1989)?

4. Despite controlling federal statutory law and criminal procedure doctrines barring his entitlement to a COA, is a foreign national nonetheless entitled to such relief based upon the decisions of the ICJ in *Avena* and *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27) ("*LaGrand*"), as a matter of proposed international judicial comity and uniform treaty interpretation?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	vi
Statement of the Case	1
Summary of Argument	4
Argument	8
I. Medellín's Request for a Certificate of Appealability on His Vienna Convention Claim Is Barred by Controlling Federal Law	8
A. The AEDPA Bars Medellín's COA Request	8
1. AEDPA §2253(c)(2) bars Medellín's COA request	8
a. A COA is a mandatory jurisdictional prerequisite to consideration of the merits of a habeas appeal	8
b. Medellín's failure to make a substantial showing of the denial of a constitutional right bars his COA request	9
c. Article 36 of the Vienna Convention cannot supersede the requirements of AEDPA §2253(c)(2)	10
2. AEDPA §2254(d) bars Medellín's COA request	11
B. The Court's Decision in *Breard* and the Procedural Default Rule Bar Medellín's COA Request	12

TABLE OF CONTENTS – Continued

	Page
1. Medellín procedurally defaulted his Vienna Convention claim	12
2. Medellín cannot meet the "cause and prejudice" exception to procedural default	15
C. The *Teague* Rule Bars Medellín's COA Request	17
II. Under the Court's Test for Reexamining Precedent, *Breard* Should Not Be Overruled	17
A. Only This Court Has the Authority to Overrule *Breard*	17
B. The *Casey* Factors Should Apply To Any Reconsideration of the Holding in *Breard*	18
C. Under *Casey*, *Breard* Should Not Be Overruled	19
1. The procedural-default rule protects finality of convictions and helps preserve the proper balance between federal and state authority	19
2. The procedural-default rule enhances reliable criminal adjudication and prevents "sandbagging."	20
III. *Avena* Does Not Supersede Federal Law Because the Vienna Convention Does Not Create Individual Rights and ICJ Decisions Are Not Binding Upon United States Courts	23
A. The Vienna Convention Does Not Create Individual Rights	25

TABLE OF CONTENTS – Continued

Page

1. International agreements generally do not create enforceable individual rights 25

2. The Vienna Convention does not require that violations of consular notification be remedied in criminal proceedings 27

   a. The text of the Vienna Convention expressly disavows individual rights that are judicially enforceable 28

   b. The State Department has consistently construed the Convention not to create individual rights 30

   c. The ratification history of the Convention also gives no indication of an intent to provide judicially-enforceable individual rights 31

B. ICJ Decisions, Such as *Avena*, Do Not Constitute Self-Executing Federal Law 32

   1. The scope of the ICJ's jurisdiction is limited to disputes between consenting nations, and its decisions are enforceable only by the Security Counsel 33

   2. Although the Optional Protocol confers jurisdiction, it does not convert the ICJ's decisions into self-executing federal law 36

   3. Treating *Avena* as a "rule of decision" would create untenable conflicts with the AEDPA and established doctrines of criminal procedure 37

TABLE OF CONTENTS – Continued

Page

   4. The Court should not defer to the ICJ based upon any presumption that it has expertise in treaty interpretation 40

C. Fulfilling Treaty Obligations Under Article 36 Is the Task of the Political Branches 41

   1. The implementation of the Vienna Convention is outside the appropriate scope of judicial review 41

   2. To hold that the political branches could have vested the ICJ with power to determine both state and federal law would raise serious constitutional concerns 42

D. Medellín Has Other Avenues to Seek Remedies for Article 36 Violations 46

IV. The ICJ's Decisions in *LaGrand* and *Avena* Are Not Enforceable Under Comity and Are Inconsistent With Uniform Treaty Interpretation 47

Conclusion 50

TABLE OF AUTHORITIES

Page

CASES

Amadeo v. Zant, 486 U.S. 214 (1988) 16
Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) 47
Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 26
Asakura v. Seattle, 265 U.S. 332 (1924) 27
Barefoot v. Estelle, 463 U.S. 880 (1983) 23
Barrientes v. Johnson, 221 F.3d 741 (CA5 2000) 16
Boos v. Barry, 485 U.S. 312 (1988) 44
Breard v. Greene, 523 U.S. 371 (1998) ..... *passim*
Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) 44, 45
Charlton v. Kelly, 229 U.S. 447 (1913) 42
Cheung Sum Shee v. Nagle, 268 U.S. 336 (1925) 27
Chevron, U.S.A. v. Nat. Res. Defense Council, 467 U.S. 837 (1984) 40, 41
Chicago & Southern Airlines v. Waterman SS Corp., 333 U.S. 103 (1948) 41
Chirac v. Chirac's Lessee, 15 U.S. (2 Wheat.) 259 (1817) 27
Coleman v. Thompson, 501 U.S. 722 (1991) 15, 19
Comm. of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (CADC 1988) 35
Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 43, 44, 46
Dames & Moore v. Regan, 453 U.S. 654 (1981) 44
Diggs v. Richardson, 555 F.2d 848 (CADC 1976) 35

TABLE OF AUTHORITIES – Continued

Page

Edwards v. Carpenter, 529 U.S. 446 (2000) 15
El Al Israeli Airlines v. Tsui Yuan Tseng, 525 U.S. 155 (1999) 28, 30, 40
Engle v. Isaac, 456 U.S. 107 (1982) 16, 20
Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812) 27
Fay v. Noia, 372 U.S. 391 (1963) 20, 21
Fierro v. Cockrell, 294 F.3d 674 (CA5 2002) 39
Fisher v. Texas, 169 F.3d 295 (CA5 1999) 13
Flores v. S. Peru Copper Corp., 343 F.3d 140 (CA2 2003) 36
Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) 9
Goldstar v. United States, 967 F.2d 965 (CA4 1992) 26
Hagen v. Utah, 510 U.S. 399 (1994) 40
Hauenstein v. Lyndham, 100 U.S. 483 (1879) 27
Hayburn's Case, 2 Dall. 409 (1792) 43
Hilton v. Guyot, 159 U.S. 113 (1895) 47
In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F.R.D. 280 (D.D.C. 1952) 36
Kolovrat v. Oregon, 366 U.S. 871 (1961) 27
Kuhlmann v. Wilson, 477 U.S. 436 (1986) 21
Machinists v. Street, 367 U.S. 740 (1961) 46
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 43
McCleskey v. Zant, 499 U.S. 467 (1991) 21

TABLE OF AUTHORITIES – Continued

Page

McFarland v. Scott, 512 U.S. 849 (1994) 22-23

Medellin v. Dretke, 125 S.Ct. 686 (2004) 4

Medellin v. State, No. 71,997, slip op. (Tex. Crim. App. 1997) ..... *passim*

Miller-El v. Cockrell, 537 U.S. 322 (2003) 8, 9

Murphy v. Netherland, 116 F.3d 97 (CA4 1997) 9, 10

Murray v. Carrier, 477 U.S. 478 (1986) 15

Murray v. the Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 46

Neal v. State, 150 S.W.3d 169 (Tex. Crim. App. 2004) 13

Olympic Airways v. Husain, 540 U.S. 644 (2004) 28

O'Dell v. Netherland, 521 U.S. 151 (1997) 17

People of Saipan v. United States Dep't of Interior, 502 F.2d 90 (CA9 1974) 36

Pickney v. Cain, 337 F.3d 542 (CA5 2003) 17

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 5, 18, 19, 23

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 18, 43

Reid v. Covert, 354 U.S. 1 (1957) 6, 10, 44

S. Cent. Bell Tel. Co. v. Ala., 526 U.S. 160 (1999) 19

Slack v. McDaniel, 529 U.S. 473 (2000) 9

Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522 (1987) 14

TABLE OF AUTHORITIES – Continued

Page

Somportex Ltd. v. Philadephia Chewing Gum Corp., 453 F.2d 435 (CA3 1971) 47

Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004) 40, 41

Spiess v. C. Itoh & Co. (Am.), 643 F.2d 353 (CA5 1981) 36

State v. Mercado, 972 S.W.2d 75 (Tex. Crim. App. 1998) 13

Strickler v. Greene, 527 U.S. 263 (1999) 16, 17

Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982) 30

Teague v. Lane, 489 U.S. 288 (1989) 5, 6, 17, 40

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (CADC 1984) 26

The Cherokee Tobacco, 78 U.S. 616 (1870) 44

The Head Money Cases, 112 U.S. 580 (1884) 10, 26, 27

Thomas v. Union Carbide Agricultural Products, 473 U.S. 568 (1985) 44

Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533 (1983) 18

United States v. Alvarado-Torres, 45 F.Supp.2d 986 (S.D. Cal. 1999) 23

United States v. Alvarez-Machain, 504 U.S. 655 (1992) 28

United States v. Gengler, 510 F.2d 62 (CA2 1975) 26

United States v. Jimenez-Nava, 243 F.3d 192 (CA5 2001) 26

TABLE OF AUTHORITIES – Continued

Page

United States v. Li, 206 F.3d 56 (CA1 2000) 6, 25, 26, 29, 30, 31

United States v. Rosenthal, 793 F.2d 1214 (CA11 1986) 27

United States v. Stuart, 489 U.S. 353 (1989) 30

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) 14

Wainwright v. Sykes, 433 U.S. 72 (1977) 14, 20, 21

Waldron v. INS, 17 F.3d 511 (CA2 1993) 9

Whitney v. Robertson, 124 U.S. 190 (1888) 10, 42

Williams v. Taylor, 529 U.S. 362 (2000) 11

Young v. United States, 124 F.3d 794 (CA7 1997) 9

CASES OF FOREIGN JURISDICTIONS

Administration des Habous v. Deal, 19 I.L.R. 342 (Morocco, Ct. App. Rabat. 1952) 35

Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 128 (Mar. 31) ..... *passim*

BGH 5 StR 116/0 decided on 7 Nov. 2001, *available at* http://www.bundesgerichtshof.de (Germany) 49

Canada v. VanBergen, 261 A.R. 387 (2000) 48

LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) ..... *passim*

Mackay Radio & Tel. Co. v. Lal-la Fatma Bent si Moahamed el Khadar et al., 21 I.L.R. 136 (Tangier, Ct. App. Int'l Trib. 1954) 35

R. v. Abbrederis, [1981] 36 A.L.R. 109 48

TABLE OF AUTHORITIES – Continued

Page

Re Yater, "Judicial Decisions," 1976 Ital. Y.B. Int'l Law, Vol. II, pp. 336-39 48

R. v. Partak, [2-1] 160 C.C.C. (3d) 553 (Canada) 49

Socobel v. the Greek State, 30 Avril 1950, 18 I.L.R. 3 ..... 34, 35

TREATIES AND FEDERAL STATUTES

U.S. CONST. art. II, §2, cl.2 ..... 44, 45

U.S. CONST. art. II, §3 47

U.S. CONST. art. III 45

U.S. CONST. art. III, §1 42

U.S. CONST. art. VI, cl.2 ..... 33, 47

28 U.S.C. §2244(d)(1) 38, 39

28 U.S.C. §2253(c)(2) 4, 8, 9, 10, 11, 12

28 U.S.C. §2254 ..... 11, 39

28 U.S.C. §2254(a) 9, 39

28 U.S.C. §2254(d) 11

28 U.S.C. §2254(d)(1) 5, 11

28 U.S.C. §2254(e)(2) 12, 39

OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON CONSULAR RELATIONS CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES, Apr. 24, 1963, 21 U.S.T. 77 ..... *passim*

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE Stat. 1055 (1945) ..... *passim*

The 1976 Treaty on the Execution of Penal Sentences, Nov. 25, 1976, Mex.- U.S., 28 U.S.T. 739 49

TABLE OF AUTHORITIES – Continued

Page

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 ..... *passim*

U.N. CHARTER art. 94 ..... 34, 35, 37

OTHER AUTHORITIES

A. Mark Weisburd, *Problems with the Concept of "Vertical Conflicts,"* 96 AM. SOC'Y INT'L L. PROC. 42 (2002) 45

Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution,* 55 STAN. L. REV. 1557 (2003) 45

Department of State Answers to the Questions Posed By the First Circuit in *United States v. Nai Fook Li*" "State Department *Li* Answers," at A-1, A-3 ..... 30, 31, 46

Sandra Day O'Connor, *Federalism of Free Nations,* 28 N.Y.U. J. INT'L L. & POL. 35 (1996) 43

LEYES Y CODIGOS DE MEXICO, C.F.P.P., art. 128.IV (1995) 49

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 25

S. EXEC. DOC. E, 91-1 (1969) 32, 37

S. EXEC. REP. No. 91-1 (1969) 37

STATEMENT OF THE CASE

On the evening of June 24, 1993, Petitioner José Ernesto Medellín and fellow members of the "Black and Whites" gang in Houston, Texas, assembled to initiate a new member, Raul Villareal. *Medellin v. State*, No. 71,997, slip op., at 2 (Tex. Crim. App. 1997); Appendix to the Petition ("P.A."), at 4a. The initiation involved Villareal's fighting each gang member for five to ten minutes, culminating in his acceptance into the gang. *Id.*

Around 11:15 p.m., fourteen-year-old Jennifer Ertman and sixteen-year-old Elizabeth Pena were returning home from visiting a girlfriend when they took a shortcut that led them near the gang members. *Id.* As they passed Medellín, he attempted to engage Elizabeth in conversation. *Id.* When she tried to run, Medellín grabbed her and threw her to the ground. *Id.* Elizabeth screamed for Jennifer to help her. *Id.* In response, Jennifer ran back to help, but she was grabbed by gang members Sean O'Brien and Peter Cantu and also thrown to the ground. *Id.*

As Medellín later confessed, what ensued was the brutal gang rape and murder of both Jennifer and Elizabeth. *Id.*, at 5a. The gang members orally, vaginally, and anally raped both of them. *Id.* When they were done, they strangled both girls to death. *Id.*, at 5a-6a.

Later that evening, Medellín and other gang members went to Cantu's house, where he lived with his brother and sister-in-law, Joe and Christina Cantu. *Id.*, at 5a. Christina asked what they had done that evening, and Medellín responded that they "had fun" and that their exploits would be seen on the television news. *Id.*

Medellín described how he had punched one of the girls because she had started screaming after he grabbed her. Medellín went on to recount gang-raping both girls and showed them his blood-soaked underwear. *Id.*

When Christina asked what had happened to the girls, Medellín told her they had both been killed so they could not identify their attackers. *Id.* Medellín explained

that killing the girls would have been easier with a gun, but because they did not have one, he took off one of his shoelaces and strangled one of the girls with it. *Id.*, at 5a-6a. Medellín complained of the difficulty in killing Jennifer and Elizabeth, relating that he had to put his foot on one of their throats because she would not die. *Id.*, at 6a.

Medellín and his gang members then divided up the money and jewelry taken from Jennifer and Elizabeth. *Id.*, at 5a. Medellín's brother kept one of the girls' Mickey Mouse watch, J.A. 18, and Medellín kept a ring belonging to Jennifer – which he later gave to his girlfriend, P.A. 5a.

After hearing Medellín's grisly tale, Christina Cantu convinced her husband in the ensuing days to report the crime to the police. *Id.*, at 6a. By the time Jennifer's and Elizabeth's bodies were found, they were badly decomposed and were identifiable only through dental records. *Id.* Based on the pattern of decomposition, the medical examiner determined that each girl had suffered enormous trauma to the genital region, 32.TR.851-58, 872-75, 895, 897, 900-01,[1] and had died of trauma to the neck consistent with strangulation, P.A. 6a.

The individuals who raped and murdered Jennifer and Elizabeth were subsequently apprehended. *Id.* After reading *Miranda* warnings aloud and signing a written waiver, Medellín gave a written confession of his participation in the crime. *Id.*; J.A. 14-18. His confession detailed, *inter alia*, how the girls pleaded for their freedom prior to being murdered. J.A. 16-17.

Although born in Mexico, Medellín has lived in the United States most of his life. 35.TR.282-83. Medellín speaks, reads, and writes English, 30.TR.648; 31.TR.687; 35.TR.283, and attended American public schools since elementary school, 30.TR.648, 670; 35.TR.283, 289-90. Nevertheless, he remains a citizen of Mexico, and the local

[1] "TR" refers to the reporter's record, preceded by the volume number and followed by the page numbers.

law enforcement officers failed to notify him of his right to notify his consulate. Pet'r Br., at 5.

Because Medellín was indigent, the trial court appointed counsel to represent him. 1.TR.10; J.A. 22. In the face of overwhelming evidence of guilt, counsel vigorously defended Medellín. Prior to trial, counsel filed more than 50 pleadings with the trial court, including motions demanding disclosure of the State's evidence, an effort to change venue, challenges to the constitutionality of parts of the jury charge and the capital sentencing scheme, and attempts to exclude evidence from the jury's consideration – most significantly Medellín's confession to the crime. J.A. 19-27, 29-31; 3.TR.6-185, 4.TR.3-32. At trial, counsel participated in extensive voir dire of the prospective jurors, comprising 20 volumes of trial transcript, *see* TR. volumes 6-25, during which process he struck 15 potential jurors and made two alternate strikes. J.A. 27; 4.TR.279-80. During trial, counsel vigorously challenged the State's case, particularly through cross-examination and voir dire examination of the State's principal witnesses. For example, counsel explored potential discrepancies between the testimony of key state witnesses Joe and Christina Cantu. J.A. 51; 29.TR.430-60, 480-90, 543-77, and challenged the personal knowledge of gang members Roman and Frank Sandoval, also key witnesses for the State. J.A. 51; 29.TR.269-87, 330-66. Counsel attempted to exclude important and damaging physical evidence such as crime-scene photographs and related physical items. J.A. 83-91; 28.TR.42, 61-62, 145; 29.TR.399, 468; 30.TR.586-87. During the punishment phase, counsel presented several witnesses to testify on Medellín's behalf. J.A. 58-59. Medellín's former employer, school adviser, and parents all testified as to his general character. *Id.*; 35.TR.260-93. Counsel also had a psychologist with more than 30 years of professional experience – including four years as the chief psychologist of the Texas Department of Corrections in the late 1970s – testify in an effort to avert a death sentence. J.A. 59; 35.TR.294-349.

At no point before or during the trial did Medellín or his counsel raise any claim of consular notification.

On September 16, 1994, the jury unanimously convicted Medellín of murder during the course of a sexual assault – a capital offense. P.A. 32a. On October 11, 1994, Medellín was sentenced to death. The Texas Court of Criminal Appeals affirmed in an unpublished opinion. P.A. 1a-31a. Medellín did not petition this Court for certiorari. Instead, Medellín filed an application for writ of habeas corpus in the trial court on March 26, 1998, raising for the first time a consular notification claim. The trial court entered findings of fact and conclusions of law recommending that it be denied, P.A. 58a, and the Court of Criminal Appeals rejected Medellín's habeas application, P.A. 32a.

On November 11, 2001, Medellín filed a federal habeas petition in the United States District Court for the Southern District of Texas, which he amended on July 18, 2002, J.A. 6. The federal petition again included a claim of consular notification. The district court denied federal habeas relief and a COA on all claims. J.A. 3. Medellín's subsequent application for a COA to the Fifth Circuit was denied on May 20, 2004. J.A. 12. He petitioned this Court for certiorari, which was granted on December 10, 2004. *Medellin v. Dretke*, 125 S.Ct. 686 (2004).

SUMMARY OF ARGUMENT

This case is an appeal from the denial of a certificate of appealability from the denial of a federal habeas corpus petition. As such, it is governed by clear, objective standards of federal law. And under controlling federal law, Medellín cannot receive the relief he seeks.

Federal Law Bars Habeas Relief: Federal law poses four independent barriers to granting the writ. First, as a jurisdictional prerequisite, Medellín has failed to make a substantial showing of the denial of a constitutional right, a necessary requirement to obtaining a COA under §2253(c)(2) of the AEDPA. Absent a substantial showing of the denial of a constitutional right, the Court has no jurisdiction to consider this appeal.

Second, because the Court's precedent rejects claims identical to Medellín's, he cannot show that the state court

decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," as required by §2254(d)(1) of the AEDPA.

Third, the Court's decision in *Breard v. Greene* controls this case. Under *Breard*, Medellín procedurally defaulted his Vienna Convention claim by failing to properly raise it in state court. Because Medellín failed to assert his rights under the Vienna Convention in conformity with the laws of the United States and the State of Texas, he cannot now raise a claim of violation of such rights on federal habeas review.

And fourth, to grant Medellín the relief he seeks on federal habeas review would contravene the rule of *Teague v. Lane*, because it would be applying a new rule of law announced after his conviction became final.

***Avena* Does Not Alter Controlling Federal Law:** Medellín attempts to circumvent both the AEDPA and this Court's precedent by invoking *Avena*. The ICJ ruling in *Avena* purports to require American courts to "review and reconsider" the cases of Medellín and 50 other Mexican nationals without regard to procedural default. P.A. 195a, 247a-62a.

For at least six reasons, however, *Avena* does not alter controlling federal law, and federal law prohibits the relief Medellín seeks. First, the ICJ's *Avena* decision cannot overrule *Breard*. Only this Court can reexamine its prior holdings, informed by "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). In light of the Court's test for reexamination of prior holdings under *Casey*, *Avena* provides no justification for overturning *Breard*.

Second, *Avena*, by its own terms, concerns the interpretation and application of Article 36 of the Vienna Convention, a treaty entered into before the enactment of the AEDPA. Under the "last in time" doctrine, "'an Act of Congress . . . is on a full parity with a treaty, and [] when

a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" *Breard*, 523 U.S., at 376 (citing *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)). Congress's adoption of the AEDPA supersedes any right to "review and reconsideration" purportedly inuring to Medellín's benefit from the Vienna Convention.

Third, the Vienna Convention does not create individual rights. The Convention was drafted to facilitate consular relations between nations, and the text of the Convention expressly disclaims any intent "to benefit individuals." The interpretation of the United States, to which the Court gives great deference, has uniformly confirmed that textual reading; since the treaty was adopted, the Department of State has maintained that the Convention does not "'establish[] rights of individuals'"; indeed, "'[t]he [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law.'" *United States v. Li*, 206 F.3d 56, 63 (CA1 2000) (quoting the State Department).

Fourth, the Optional Protocol, the separate treaty that gives the ICJ jurisdiction, is not "self-executing," that is, does not create rights that are independently judicially enforceable. Examination of the text of all four documents touching on the ICJ's authority – the Convention, the Optional Protocol, the U.N. Charter, and the ICJ statute – demonstrates that the only means of enforcing ICJ judgments are political or diplomatic, not judicial.

Indeed, prior to *LaGrand* and *Avena*, no court in the world had ever inferred an obligation on the part of a nation's judiciary independently to compel compliance with ICJ decisions.

Fifth, treating *Avena* as a "rule of decision" would create irreconcilable conflicts with the AEDPA, the procedural-default rule, and *Teague*. And the effect of immunizing consular-notification claims across the board from procedural default (as *Avena* purports to do) would inevitably create perverse incentives for defendants to

"sandbag," deliberately declining to raise Vienna Convention claims at trial and then raising them later to secure retrials or postpone impending executions.

And sixth, treating ICJ decisions as binding rules of decision in domestic courts would pose serious constitutional problems, under both Article III and the Appointments Clause. To avoid those constitutional questions, the Court should give effect to the plain language and consistent understanding of the treaties, and conclude that ICJ decisions are not judicially enforceable in U.S. courts.

Comity and Uniform Treaty Interpretation Do Not Support the Relief Medellín Seeks: Medellín's argument that the Court should give binding effect the ICJ judgment as a matter of comity – notwithstanding the myriad legal barriers to doing so – must fail. Comity does not authorize disregarding federal statutes such as the AEDPA, and comity does not reasonably apply to foreign judgments purporting to control legal affairs within U.S. domestic borders. And – given that no country in the world gives binding judicial effect to ICJ judgments – becoming the first nation to do so would undermine, not promote, uniform treaty interpretation.

It is beyond cavil that, as Medellín puts it, America should keep her word. But the choice of how to do so, and how to respond to alleged treaty violations, is left to the political branches of government. Mexico may pursue, pursuant to the U.N. Charter, remedies at the Security Council, or it may explore diplomatic options directly with the United States. The President and Congress could seek to pass legislation addressing the *Avena* decision, or the President could sign an Executive Order creating some form of executive review. All of these options are traditional remedies for violations of state-to-state treaties. None of them requires displacing this Court's authority "to say what the law is" and to uphold federal statutes and binding rules of criminal procedure.

ARGUMENT

I. MEDELLÍN'S REQUEST FOR A CERTIFICATE OF APPEALABILITY ON HIS VIENNA CONVENTION CLAIM IS BARRED BY CONTROLLING FEDERAL LAW.

Medellín endeavors to frame this case as a contest between the United States' treaty obligations and state officials who are unwilling to yield to the demands of that treaty. But there should be no doubt: Texas fully recognizes, as it must, that the Vienna Convention is binding federal law under the Supremacy Clause.

The impediment to according legal force to the ICJ's *Avena* judgment is not resistance from the States; rather, doing so is foreclosed by the strictures of controlling federal law. And nothing in *Avena* alters that federal law.

A. The AEDPA Bars Medellín's COA Request.

1. AEDPA §2253(c)(2) bars Medellín's COA request.

a. A COA is a mandatory jurisdictional prerequisite to consideration of the merits of a habeas appeal.

Medellín challenges the Fifth Circuit's decision that he was not entitled to a COA based on his purported individual rights under the Vienna Convention. Medellín asks the Court to reverse and remand the case with instructions to issue a COA. Pet'r. Br., at 50.

Under the AEDPA, a COA must be obtained before federal courts of appeals can rule on the merits of a habeas appeal. "Until a COA has been issued federal courts of appeals *lack jurisdiction* to rule on the merits of appeals from habeas petitioners." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (emphasis added).

"[W]hen a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." *Id.*, at 327. "This threshold inquiry does not require full

consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.*, at 336. Thus, meeting the AEDPA's requirements for issuance of a COA constitutes a jurisdictional prerequisite to any reconsideration of Medellín's conviction or sentence.

b. Medellín's failure to make a substantial showing of the denial of a constitutional right bars his COA request.

In order to obtain a COA, a petitioner whose habeas petition and COA was denied by a district court must make "a substantial showing of the denial of a *constitutional* right." 28 U.S.C. §2253(c)(2) (emphasis added). The explicit reference to a "constitutional" right requires that the underlying petition for collateral relief raise a constitutional claim, not merely a claim based upon a federal statute or treaty, the other two potential bases for habeas relief. *See* 28 U.S.C. §2254(a); *Murphy v. Netherland*, 116 F.3d 97, 99-100 (CA4 1997); *Young v. United States*, 124 F.3d 794, 798-99 (CA7- 1997). This Court, in turn, has taken "due note [of Congress's] substitution" of the term "constitutional" in §2253(c)(2) for "federal," which had been the standard for a Certificate of Probable Cause prior to the AEDPA. *See Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Thus, "[t]o obtain a COA under §2253(c), a habeas petitioner must make a substantial showing of the denial of a constitutional right. . . . " *Id.*, at 483-84.

A State does not deny an individual's constitutional right when it violates a treaty any more than it would violate a constitutional right were it to violate a federal statute. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 259 (1829) (stating that a treaty must "be regarded in courts of justice as equivalent to an act of the legislature"). "[E]ven if the [Vienna Convention] could be said to create individual rights (as opposed to setting out the rights and obligations of signatory nations), it certainly does not create *constitutional* rights." *Murphy*, 116 F.3d at 100 (emphasis in original); *see also Waldron v. INS*, 17 F.3d 511, 518 (CA2 1993) (The Vienna Convention does not "implicate fundamental rights with constitutional . . . origins. . . . ").

"[A]lthough states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions . . . into violations of *constitutional* rights." *Murphy*, 116 F.3d, at 100 (emphasis in original). Were the converse true, every violation of federal statute – likewise enforced via the Supremacy Clause – could be deemed a constitutional violation.

Because Medellín cannot make a substantial showing of the violation of a *constitutional* right, his challenge to the court of appeals's denial of a COA must fail.

c. Article 36 of the Vienna Convention cannot supersede the requirements of AEDPA §2253(c)(2).

Two related principles of American law – reaffirmed in *Breard* – prevent Medellín from circumventing the controlling provisions of the AEDPA by reference to purported rights of review and reconsideration under the Vienna Convention as construed by the ICJ. In the specific context of a conflict between the Vienna Convention and the AEDPA, the Court explained,

> "[w]e have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" *Breard*, 523 U.S., at 376 (citing *Reid*, 354 U.S. at 18).

See also The Head Money Cases, 112 U.S. 580, 598-99 (1884) (observing that treaties are subject to modification by acts of Congress); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (noting that if a treaty and a federal statute conflict, "the one last in date will control the other").

Even assuming *arguendo* that the Vienna Convention invested Medellín with an individual right to "review and reconsideration" of criminal convictions, the subsequently-enacted provisions of the AEDPA control. Under the "last in time" rule, the AEDPA supersedes any inconsistent

provisions of the Convention, *Breard*, 523 U.S., at 376, and so §2253(c)(2) bars Medellín's request for a COA.

2. AEDPA §2254(d) bars Medellín's COA request.

Even if Medellín's treaty claim could state an issue of constitutional dimension under §2253(c)(2), his request for a COA would still fail under §2254 because the federal district court correctly upheld the state court's denial of his habeas petition. The state habeas court's rejection of Medellín's claim that the Vienna Convention provided individual rights that cannot be procedurally defaulted was not contrary to clearly established federal law, and so he cannot receive a COA on this issue.

A habeas writ shall not be granted with respect to any claim that was adjudicated on the merits in state-court proceedings unless such adjudication was (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). The "contrary to" prong of §2254(d)(1) permits a federal court to issue a writ *only* when "the state court arrives at a conclusion opposite to that reached by [the] Court on a question of law or . . . decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

Medellín argues that the lower state and federal courts improperly denied his claim because the Convention creates individual rights and the procedural-default rule is superseded by *Avena*. Pet'r Br., at 33-37. But it cannot reasonably be argued that the state habeas court's rejection of these claims, P.A. 55a-56a, was contrary to clearly established federal law – indeed it flowed directly from the Court's holding in *Breard*. Therefore, §2254(d) bars Medellín's COA request.

B. The Court's Decision in *Breard* and the Procedural-Default Rule Bar Medellín's COA Request.

The Court has already addressed the precise question whether procedurally-defaulted claims of violations of consular notification under the Vienna Convention can be considered on federal habeas. They cannot. In *Breard*, the Court squarely held that the Vienna Convention is subject to the AEDPA and that claims under the Convention can be procedurally defaulted. 523 U.S., at 375-76.

The Court acknowledged in *Breard* that it could be argued that the Vienna Convention creates an individual right to consular assistance following arrest – but held that nonetheless Breard's ability to obtain relief based on violations of the Vienna Convention was subject to the subsequently enacted provisions of the AEDPA. *Id.* Under §2254(e)(2), a habeas petitioner will, as a general rule, not be afforded an evidentiary hearing if he has failed to develop the factual basis of the claim in state court proceedings. *Id.*; 28 U.S.C. §2254(e)(2). Because Breard had failed to develop the factual basis of his Vienna Convention claim in state court, the Court held that any rights conferred by the Convention were subject to §2254(e)(2) – preventing Breard from obtaining relief.

Breard applies equally here. Medellín's case squarely presents a request for a COA governed by §2253(c)(2). Medellín attempts to circumvent the AEDPA by invoking a purported right to "review and reconsideration" derived from the Vienna Convention. Yet, even if he had such a right, it would directly conflict with §2253(c)(2)'s requirement that he make a substantial showing of the violation of a *constitutional* right in order to obtain a COA. Because the AEDPA provision controls under the "last in time" rule, his claim must fail.

1. Medellín procedurally defaulted his Vienna Convention claim.

The court of appeals correctly held that Medellín's Vienna Convention claim was procedurally defaulted and

that he therefore was not entitled to a COA. P.A. 131a, 135a. The state habeas court determined, and Medellín does not contest, that he failed to object to the violation of the Vienna Convention at his trial. P.A. 46a, 79a, 131a. Under the Texas "contemporaneous objection" rule, Medellín's failure to object at trial resulted in a procedural default of his Vienna Convention claim. *State v. Mercado*, 972 S.W.2d 75, 77-78 (Tex. Crim. App. 1998); *see also Neal v. State*, 150 S.W.3d 169, 179 (Tex. Crim. App. 2004). Texas's contemporaneous objection rule has consistently been upheld as an "adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims." *Fisher v. Texas*, 169 F.3d 295, 300 (CA5 1999).

Despite his procedural default, Medellín contends that, under *Avena*, his Vienna Convention claim may be heard in federal court. In *Avena*, the ICJ determined that when the United States breaches Article 36(1), Article 36(2) precludes application of a procedural bar to prevent review and reconsideration of a sentence and conviction. P.A. 247a-49a, ¶¶112-13. According to Medellín, the ICJ's ruling is dispositive on this issue, and the procedural-default rule must be given no effect in his case.

Breard dictates a different result – specifically, that consular notification claims under the Vienna Convention are subject to procedural default. 523 U.S., at 375-76. And the court of appeals correctly applied *Breard* in its denial of a COA. P.A. 131a-32a.

Breard's reasoning is instructive. Breard argued that his claim could be heard in federal court because the Vienna Convention is the "supreme law of the land" which therefore "trumps the procedural default doctrine." 523 U.S., at 375. The Court rejected that argument – the exact argument now raised by Medellín – stating that it was "plainly incorrect." *Id.* The Court explained that state procedural doctrines may be displaced only by an express statement in the treaty itself:

> "[W]hile we should give respectful consideration to the interpretation of an international treaty

> rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a *clear and express statement* to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* (emphasis added).

Thus, while the ICJ's judgment is entitled to "respectful consideration," it cannot be dispositive. Only an express statement, signed by the President and ratified by the Senate, could potentially supersede state procedural rules.[2]

The Court concluded that this principle is expressly incorporated into Article 36(2) of the Vienna Convention:

> "This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended.'" *Id.* (quoting Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(2), 21 U.S.T. 77, 101).

Construing the very language of Article 36(2) relied upon by Medellín, the Court determined that the Convention *does not* expressly state that the procedural rules of the forum State will not govern the treaty's implementation in that State. *Id.*, at 375-76.

Therefore, the Court applied the procedural-default rule in *Breard*. The Court noted the ordinary rule that claims not raised in state court are defaulted on federal habeas. *Id.* (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).

[2] *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 704 (1988) (refusing to apply treaty as domestic law absent express treaty language); *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539-40 (1987) (refusing to construe treaty to preempt state law absent a "plain statement" of Congress's intent).

The Court then concluded that Breard's failure to raise his consular notification claim under the laws of Virginia and the United States barred him from raising a Vienna Convention claim on habeas review. *Id.*, at 375-76.

The holding in *Breard* is both directly applicable to and dispositive of Medellín's request for a COA. Because Medellín, like Breard, failed to exercise his rights under the Vienna Convention in conformity with the laws of Texas and the United States, he is not entitled to a COA.

2. Medellín cannot meet the "cause and prejudice" exception to procedural default.

A habeas petitioner who has procedurally defaulted his claims may, nonetheless, receive review of the merits, but only upon "demonstrat[ing] cause for his state-court default of any federal claim, and prejudice therefrom." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Medellín cannot meet the "cause and prejudice" standard.

The Court has acknowledged that "[it has] not identified with precision exactly what constitutes 'cause' to excuse a procedural default." *Id.* However, "the question of cause for a procedural default does not turn on whether counsel erred. . . . Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Medellín can show no reason "external to [his] defense" for his failure to object at trial.[3] Nor can he claim

[3] Nor does the subsequently-issued decision in *Avena* constitute an external factor sufficient to serve as cause. *Avena* did not create the consular notification obligation; the Vienna Convention did, in 1969. Thus, the entire basis for Medellín's claim was present and available long before the date of his trial.

that ignorance of the consular-notification claims constitutes an excuse. *Id.*, at 486 ("[T]he demands of comity and finality counsel against labeling alleged unawareness of the objection as a cause for procedural default.") (quoting *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982)). Whether or not Medellín knew he was waiving any claim by not objecting at trial, his failure to object cannot provide "cause" for the procedural default. *Id.* ("[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default."). Because no "cause" has been shown, analysis of prejudice is unnecessary and Medellín has waived his claims.

Nonetheless, Medellín cannot show prejudice either. Like "cause," the standard for "prejudice" is less than clear, *see Barrientes v. Johnson*, 221 F.3d 741, 769 (CA5 2000) ("The Supreme Court has been reluctant to define the precise contours of the prejudice requirement.") (citing *Amadeo v. Zant*, 486 U.S. 214, 221 (1988)). Yet the Court has given some guidance, *see Strickler v. Greene*, 527 U.S. 263, 289-90 (1999) (habeas petitioner "must convince [the Court] that 'there is a reasonable probability' that the result of the trial would have been different ... The question is not whether the defendant would more likely than not have received a different verdict ... but whether ... he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

The evidence against Medellín was overwhelming. Medellín confessed to the crimes in detail shortly after his arrest – and long before it would have been practical to require that the Mexican consulate be notified. J.A. 14-18. At trial, several witnesses testified that Medellín had described and even bragged to them on the night of the murders about his substantial involvement in the crimes. 29.TR.383-95, 405-07, 422-28; 30.TR.521-36; J.A. 51. Finally, the jury was provided physical evidence and related testimony further connecting Medellín to the crimes – including testimony that he had given a ring belonging to Jennifer Ertman to his girlfriend a few days after the crimes. 31.TR.748-52; J.A. 52. By any measure,

Medellín's conviction and sentence are "worthy of confidence." *Strickler*, 527 U.S., at 290; *see also Pickney v. Cain*, 337 F.3d 542, 545 (CA5 2003) (A showing of actual prejudice is accomplished when the petitioner "demonstrates that, but for the error, he might not have been convicted."). Medellín cannot show any alleged violation that casts doubt upon the validity of his conviction or his sentence, and so, without cause and prejudice, cannot circumvent the procedural bar.

C. The *Teague* Rule Bars Medellín's COA Request.

The *Teague* rule also bars Medellín's requested relief. Under the Court's precedents, a habeas petitioner cannot enforce a "new rule" of law if the rule was announced after his conviction became final. *O'Dell v. Netherland*, 521 U.S. 151, 153 (1997) (citing *Teague v. Lane*). To obtain habeas relief, the petitioner "must demonstrate *as a threshold matter* that the court-made rule of which he seeks the benefit is not 'new.'" *Id.*, at 156 (emphasis added).

Medellín contends that *Avena* stated a new rule of decision that must be applied to his case. By necessity, Medellín asks for a new rule. To give effect to his argument, the Court would need to overrule *Breard*, a course Medellín expressly urges. Pet'r Br., at 44. Indeed, overruling prior precedent is the paradigmatic instance of a new rule.

Because Medellín's contentions would require new rules of law in relation to both the procedural-default rule and the AEDPA, his claims are barred by *Teague*.

II. Under the Court's Test for Reexamining Precedent, *Breard* Should Not Be Overruled.

A. Only This Court Has the Authority to Overrule *Breard*.

Although he is reluctant to state his position explicitly, Medellín in effect asserts that the ICJ's decision in *Avena* impliedly overturned this Court's ruling in *Breard*. Because the conflict between this Court's precedent and

Avena regarding the applicability of procedural default to Vienna Convention claims is both fundamental and irreconcilable, Medellín elides over it by simply characterizing the ICJ decision as now "binding" on this Court. He therefore requests the Court to hold that, after *Avena*, *Breard* is no longer good law. *See* Pet'r Br., at 44 (arguing that the ICJ has "definitively determined" that the procedural-default rule cannot apply).

Of course, only this Court has the power to overrule its own precedents. The principle is so fundamental that it rarely need be invoked. "Needless to say, only this Court may overrule one of its precedents." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225-26 (1995) (holding that Congress's reopening a final judgment unconstitutionally interfered with the power of the federal courts to decide cases, in violation of Article III and separation of powers). Accordingly, any decision to abandon *Breard* must be made by the Court under *its own* doctrines.

B. The *Casey* Factors Should Apply To Any Reconsideration of the Holding in *Breard*.

The Court has recognized that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Casey*, 505 U.S., at 854. Thus, when the Court reexamines a prior holding, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Id.*

In *Casey*, the Court set forth four factors to consider when reexamining a prior holding: (1) "whether the rule has proven to be intolerable simply in defying practical workability"; (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of

repudiation"; (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; or (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.*, at 854-55 (citations omitted).

Under these benchmarks, *Breard* should not be overruled. And, if the Court does decide to revisit *Breard*, it should do so in accordance with the *Casey* factors. *See S. Cent. Bell Tel. Co. v. Ala.*, 526 U.S. 160, 166 (1999) (refusing to overrule a recent precedent because, under *Casey*, Respondent did "not provide a convincing reason" to do so).

C. Under *Casey*, *Breard* Should Not Be Overruled.

Application of the *Casey* factors establishes that *Breard* should not be overruled. The procedural-default rule remains an important and workable doctrine, and it is heavily relied upon throughout the country to assure efficiency, fairness, and finality in criminal proceedings. The consequences of overruling the doctrine, even for a discrete number of foreign nationals, would cause upheaval in criminal justice systems across the nation. Because the rule has not been abandoned generally – indeed it remains a vital part of the criminal process – it should not be abrogated in whole or in part.

1. The procedural-default rule protects finality of convictions and helps preserve the proper balance between federal and state authority.

The procedural-default rule is a specific application of the Court's rule that it will not review a question of federal law decided by a state court "if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman*, 501 U.S. at 729. Thus, when a state court refuses to consider a claim because the habeas petitioner

failed to meet a state procedural requirement, an independent and adequate state-law reason supports the judgment, and the claim is procedurally barred. *Id.*; *see also Sykes*, 433 U.S., at 88-91.

The Court has also recognized that federal habeas review of a procedurally-defaulted claim in state court exacts "particularly high" costs in terms of finality, comity, and federalism. *Engle*, 456 U.S., at 128. A habeas petitioner's failure to comply with a state procedural rule deprives the state trial court of the opportunity to correct the defect and avoid the error in the first place. *Id.*

Medellín fails to articulate reasons to disregard the procedural-default rule for Vienna Convention claims, nor does *Avena* provide any other justification for overruling *Breard* under the *Casey* factors. Specifically, *Avena* fails to identify how the procedural-default rule has become "unworkable" as to Vienna Convention claims since the Court decided *Breard* in 1998. The decision gives no consideration to the costs of overruling *Breard* and abandoning the procedural-default rule in Vienna Convention cases in the United States. Finally, *Avena* does not identify any related principle of federal law that has rendered procedural default, as applied in *Breard*, "a remnant of abandoned doctrine" – or any facts unavailable to the Court at the time of its decision in *Breard* that have since robbed the procedural-default rule of significant application to Vienna Convention claims.

2. The procedural-default rule enhances reliable criminal adjudication and prevents "sandbagging."

The Court concluded in *Sykes* that the procedural-default rule was designed in part to eliminate the tactical benefit that might be derived from the stratagem of "sandbagging" by a criminal defendant. *Sykes*, 433 U.S., at 89. In rejecting the prior test of *Fay v. Noia*, 372 U.S. 391 (1963), which allowed federal habeas review for any claim absent a knowing and deliberate waiver of the claim, the Court emphasized the importance of applying the "cause"

and "prejudice" standard in cases, like Medellín's, involving the application of the contemporaneous-objection rule. *Sykes*, 433 U.S., at 89. "We think that the rule of *Fay v. Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.*

The incentive to tactically default a claim is enhanced by the inevitable difficulties in reassembling evidence for retrial. "[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986) (plurality opinion)). Thus, sandbagging may allow a defendant to avoid critical evidence in a retrial that was instrumental in his original conviction.

But the rule under *Avena* would be even broader than the now-repudiated standard in *Fay v. Noia*. Even in the case of "deliberate bypass," *Avena* would require review on the merits. Thus, Vienna Convention claims would present particularly likely candidates for sandbagging, to the significant detriment of the judicial process. For defendants from nations that provide little help to nationals facing criminal prosecution, the upside to raising the claim is nominal. But, if the claim cannot be waived, defendants could go to verdict, hope for acquittal, and, if convicted, assert the claim and get yet another bite at the apple.

Moreover, in circumstances such as Medellín's – where there was overwhelming evidence of guilt of a capital crime – if the *Avena* rule were to prevail, a defense attorney would have to be *all but irrational* to raise a Vienna Convention claim at trial. In light of the enormous probability that, no matter what the Mexican consulate did,[4]

[4] Throughout these proceedings, Medellín has failed to articulate even a single piece of evidence that only consular assistance could have

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Medellín would be convicted and sentenced to death, it would have made little sense to raise the claim earlier.[5] On death row, defendants have every incentive to delay, and the most rational course would be to wait until conviction and sentence, wait for years until post-conviction reviews are complete, and then – on the eve of execution – assert the claim and hope to start over from the beginning.

And the benefits from doing so could be more than delay. If Medellín obtains a new trial some eleven years after his first trial, the principal benefit to him will likely not be the assistance of the Mexican consulate, but rather the expected "erosion of memory" and "dispersion of witnesses" that occur with the passage of time. Although his confession would presumably be readmitted, it is not at all clear that the witnesses who testified against him could be located again over a decade later. And so, perhaps, even given the overwhelming evidence at his original trial, there is some possibility that the passage of time could enable a defendant such as Medellín to receive a lesser sentence or even acquittal on retrial.

These predictable effects would increase the frequency and lessen the reliability of subsequent retrials, which in turn would undermine finality of judgments and the integrity of the judicial process. As the Court observed in *McFarland v. Scott*, "[a] criminal trial is the 'main event' at which a defendant's rights are to be determined, and the Great Writ is an extraordinary remedy that should not

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provided him at trial. Given that Medellín spent most of his life in the United States, it is difficult to conceive what information or witnesses from Mexico the consulate might have provided. And, although Medellín has criticized the expert presented by his attorney in the punishment phase, he has never identified any other expert the Mexican consulate would have provided who might have been more effective.

[5] In this case, there is no indication that Medellín's counsel deliberately withheld raising a Vienna Convention claim; but, of course, the *Avena* rule was not at the time controlling, and so the incentive to do so would have been minimal.

be employed to 'relitigate state trials.'" 512 U.S. 849, 859 (1994) (citing *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).

Because none of the principles underlying the procedural-default rule have become obsolete, and because the rule remains both workable and of critical importance to the fair and efficient operation of criminal justice processes throughout the United States, the *Casey* factors are not satisfied. Accordingly, the Court should not overrule *Breard*.

III. *AVENA* DOES NOT SUPERSEDE FEDERAL LAW BECAUSE THE VIENNA CONVENTION DOES NOT CREATE INDIVIDUAL RIGHTS AND ICJ DECISIONS ARE NOT BINDING UPON UNITED STATES COURTS.

The Vienna Convention on Consular Relations is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. The treaty governs "the establishment of consular relations, [and] defin[es] a consulate's functions in a receiving state." *United States v. Alvarado-Torres*, 45 F.Supp.2d 986, 988 (S.D. Cal. 1999). Article 36(1)(b) of the Convention states that the authorities of a "receiving state" shall, without delay, inform any detained foreign national of his right to have the consular post of the "sending state" notified of his detention. P.A. 137a-38a. Article 36(1)(a) provides that consular officers shall be free to communicate with nationals of the sending state, and Article 36(1)(c) gives consular officers the right to visit and correspond with the detained foreign national and to arrange for his legal representation. *Id.*

In 2003, Mexico instituted the *Avena* suit against the United States in the ICJ, alleging violations of Article 36 of the Vienna Convention in relation to Medellín and 53 other Mexican nationals convicted and sentenced in American courts. Mexico requested, *inter alia*, that all of the sentences and convictions be annulled. *See Avena*, 2004 I.C.J. 128, at ¶¶13-14; P.A. 190a-95a.

The ICJ concluded that Article 36 violations had occurred in the case of Medellín and 50 other Mexican nationals. *Id.*, at ¶¶106, 153; P.A. 243a-45a, 271a-72a. The

ICJ rejected Mexico's request for annulment of the convictions and sentences and concluded that the remedy for the Article 36 violations was that the United States must provide "review and reconsideration" of both the sentences and convictions of Medellín and the other 50 Mexican nationals. *See id.*, at ¶¶14, 121-23, 153(9); P.A. 195a, 253a-54a, 274a. The ICJ further concluded that the "review and reconsideration" must take place within the judicial system of the United States, and that the doctrine of procedural default could not bar such review. *See id.*, at ¶¶111-13, 120-22, 133-34, 138-41; P.A. 247a-49a, 252a-53a, 258a-59a, 261a-62a.

Medellín maintains that federal law barring his COA is superseded by *Avena* based upon the following reasoning:

(1) the rights applied in *Avena*, which arise under the Vienna Convention, are "unquestionably self-executing" and hence judicially enforceable by individuals such as Medellín; and

(2) the Optional Protocol, the U.N. Charter, and the ICJ statute, together require U.S. courts to enforce *Avena*.

See Pet'r Br., at 13-18.

Medellín's reasoning on both points is belied by the very documents upon which he relies: the Vienna Convention, the Optional Protocol, the U.N. Charter, and the ICJ statute. Examination of each of these treaties undermines Medellín's contention that *Avena* imposes a rule of decision on U.S. courts that the Convention creates judicially enforceable individual rights. Indeed, the reading Medellín suggests is contrary to their plain text.

Medellín suggests that a self-executing treaty necessarily creates individual rights. However, that a treaty is "self-executing" in the sense that it does not require implementing legislation does not mean that it creates individual rights enforceable in American courts.

A. The Vienna Convention Does Not Create Individual Rights.

Even if Medellín's COA request were not barred under federal law, *see* Section I *supra*, his claim must fail because the Vienna Convention does not create individually enforceable rights. Medellín attempts to devise such rights by conflating the "self-execution" of a treaty with the creation of individually enforceable rights. Pet'r Br., at 32.

The term "self-executing" usually is applied to any treaty that according to its terms takes effect upon ratification and requires no separate implementing statute. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(4) (1987). Respondent agrees that the Vienna Convention is self-executing in the sense that no implementing legislation was required.

However, whether the terms of a treaty provide for private rights that are enforceable in domestic courts is a wholly separate question. *See id.*, at §111, cmt. h; *see also Li*, 206 F.3d, at 68 (Selya & Boudin, JJ., concurring) ("That courts sometimes discuss [self-execution in the sense of need for implementing legislation and self-execution as creating individual rights] together . . . does not detract from their distinctiveness. At bottom, the questions remain separate."). Medellín's contention that the Vienna Convention is "self-executing" in the sense that it creates individual rights enforceable in American judicial proceedings, by way of an ICJ decision or otherwise, is simply incorrect. Neither the text nor history of the Vienna Convention supports Medellín's claim that it creates such rights.

1. International agreements generally do not create enforceable individual rights.

The general rule is that "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." RESTATEMENT (THIRD) §907,

cmt. a. This rule derives from the longstanding principle that "[a] treaty is primarily a compact between independent nations," and that it "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *The Head Money Cases*, 112 U.S., at 598.

Because treaty violations have traditionally been resolved by "international negotiations and reclamations," the Court has concluded that "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.* This principle has consistently been applied by U.S. courts. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (holding that the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention, "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action.").[6]

Even treaties that directly benefit private parties are not necessarily construed to create private rights or provide for a private cause of action in domestic courts. For example, in *United States v. Gengler*, 510 F.2d 62, 67 (CA2 1975), the court held that "even where a treaty provides certain benefits for nationals of a particular state – such as fishing rights – it is traditionally held that any

[6] *See also Goldstar v. United States*, 967 F.2d 965, 968 (CA4 1992) ("International treaties are not presumed to create rights that are privately enforceable."); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (CA5 2001) ("[Treaties] do not generally create rights that are enforceable in the courts."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (CADC 1984) (Bork, J., concurring) ("Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts."); *Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring) ("The background presumption that treaties do not create privately enforceable rights . . . [is an] extremely important principle. . . . It is surpassingly difficult to accept the idea that, in most instances, either the Executive Branch or the ratifying Senate imagined that it was empowering federal courts to involve themselves in enforcement on behalf of private parties who might be advantaged or disadvantaged by particular readings of particular treaty provisions.").

rights arising out of such provisions are, under international law, those of the state and . . . individual rights are only derivative through states." Likewise, in *United States v. Rosenthal*, 793 F.2d 1214, 1232 (CA11 1986), the court found no merit in the defendants' argument that the actions of the United States violated its extradition treaty with Colombia because "[u]nder international law it is the contracting foreign government that has the right to complain about a violation."

A treaty can create individual rights, but only when the text of the treaty does so unambiguously. As recognized in *The Head Money Cases*, a treaty establishing particular "rights of property by descent or inheritance," gives those obligations the force of law. 112 U.S., at 598. The cases Medellín cites for the proposition that "this Court has routinely given effect to treaties conferring rights on foreign nationals," Pet'r Br., at 26, only illustrate the specific and narrow circumstances in which the Court has held that treaties provide judicially enforceable individual rights. Thus, *Kolovrat v. Oregon*, 366 U.S. 871 (1961), and *Hauenstein v. Lyndham*, 100 U.S. 483 (1879), both concern treaties expressly assuring foreign nationals' right to inherit property. Likewise, *Chirac v. Chirac's Lessee*, 15 U.S. (2 Wheat.) 259 (1817), and *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812), concern the express treaty rights of foreign nationals to hold or retain property. Finally, *Asakura v. Seattle*, 265 U.S. 332 (1924), and *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925), both involve treaties with express treaty statements that created individual rights enforceable in American courts.

2. The Vienna Convention does not require that violations of consular notification be remedied in criminal proceedings.

The Vienna Convention contains no such express statement of individual rights. It was not designed to regulate the mutual rights of individual citizens; rather, it

was designed to facilitate the exercise of consular functions between contracting nations.

a. The text of the Vienna Convention expressly disavows individual rights that are judicially enforceable.

As in *Breard*, the Court should begin by considering the text of the Vienna Convention itself, which contains no language creating a judicially enforceable individual right for violations of Article 36. Treaty provisions are construed according to the traditional rules of statutory construction, and the Court looks first to the plain language. *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning.").

The Vienna Convention is based on the premise that "an international convention on consular relations, privileges and immunities would . . . contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." Vienna Convention, preamble. The Convention expressly provides,

> "the *purpose* of [the] privileges and immunities [discussed in the Convention] is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *Id.* (emphasis added).[7]

Chapter II of the Convention, in which Article 36 appears, is entitled "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and

[7] The preamble to a treaty is negotiated language that generally sets forth the purpose of the contracting parties in choosing particular words to implement specific obligations. *See Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (looking to the Warsaw Convention's preamble to determine the purpose of the contracting parties); *El Al Israeli Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 156-57 (1999) (same); *Alvarez-Machain*, 504 U.S., at 672-73 (relying on preamble to extradition treaty with Mexico to determine intent of contracting states).

Other Members of a Consular Post." Its focus is the prerogatives of the "sending State," not individual foreign nationals. Article 36 is in Section I of Chapter II – a Section titled "Facilities, Privileges and Immunities Relating to a Consular Post." Notably, it is not found in Section II, which deals with facilities, privileges, and immunities of individuals, *i.e.*, consular officers and other "members of the consular post."

In keeping with the overall purpose of the Convention, Article 36 begins with the express statement that the provisions of paragraph (1), including the requirements of consular notification at issue in this case, are established "with a view to facilitating the exercise of consular functions relating to nationals of the sending State." Paragraph 2 of Article 36 provides that "rights referred to in paragraph 1" of the Article "shall be exercised in conformity with the laws and regulations of the receiving State," so long as those laws "enable full effect to be given" to the purpose of the rights accorded by Article 36 – those purposes being specified as "facilitating the exercise of consular functions" as described in paragraph 1. When Article 36 is violated, the aggrieved party is the sending State, because it is the sending State whose consular operations have been hindered by the violation.

Although Article 36 may provide some collateral benefits to individual foreign nationals, its overriding purpose is to facilitate the performance of consular functions by consular officials.[8] Given that the Convention's preamble expressly

[8] *See Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring):

> "It is common ground that the [Convention is an] agreement[ ] among sovereign States. Nothing in [its] text explicitly provides for judicial enforcement of [ ] consular access provisions at the behest of private litigants. Of course, there are references in the treaties to a 'right' of access, but these references are easily explainable. The contracting states are granting each other rights, and telling future detainees that they have a 'right' to communicate with their consul as a means of implementing the treaty obligations *as between*

(Continued on following page)

states that the purpose of the treaty is *not* to create individual rights, the Court should reject Medellín's invitation to discover such rights in Article 36 – which would directly contravene the negotiated meaning of the treaty.

b. The State Department has consistently construed the Convention not to create individual rights.

The plain text of the treaty disclaims individual rights. Even if there were any ambiguity, it should be resolved against finding such rights. When a treaty's terms are considered ambiguous, the Court typically relies upon nontextual sources "such as a treaty's ratification history and its subsequent operation." *United States v. Stuart*, 489 U.S. 353, 366 (1989). And here, the nontextual sources refute any individual, enforceable rights.

The United States' historic interpretation of the Vienna Convention should be accorded substantial deference. *See, e.g., El Al Israeli Airlines*, 525 U.S., at 168 ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

The State Department has consistently maintained that the Vienna Convention does not create individual rights. In *United States v. Li*, the First Circuit specifically posed the question whether the Vienna Convention creates individual rights, and the State Department advised the court that the Convention is a treaty that establishes state-to-state rights and obligations, *not* individual rights. *See* 206 F.3d, at 63 (citing "Department of State Answers to the Questions Posed By the First Circuit in *United States v. Nai Fook Li*" "State Department *Li* Answers," at A-1, A-3). The State Department specifically addressed the remedies for violations of the consular notification procedures: "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.*

States. Any other way of phrasing the promise . . . would be both artificial and awkward." (emphasis in original).

As *Li* noted, the State Department's position on the Convention may be traced to the treaty's inception. The court first pointed to a 1970 letter sent by a State Department legal adviser to the governors of the fifty States shortly after the Convention's ratification, advising that the Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the United States." *Id.*, at 64. In 1989, a letter from a Department legal adviser informed a foreign national being held in an American prison that "[w]hile the U.S. authorities are required to comply with the obligations [of Article 36], failure to do so would have no effect on [his] conviction or incarceration." *Id.*

And, most relevantly, *Li* also pointed to the State Department's written submission to the Inter-American Court of Human Rights in 1998, when Mexico sought an advisory opinion on the availability of criminal remedies for failures of consular notification – the precise issue raised in this case. The Department's submission unequivocally stated that the Vienna Convention "*does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation.*" *Id.* (emphasis added). The *Li* court thus correctly concluded that "the Department has denied the availability of criminal remedies for failures of consular notification." *Id.*

c. The ratification history of the Convention also gives no indication of an intent to provide judicially-enforceable individual rights.

Legal materials produced at the time the Convention was ratified comport with the view that it does not confer

rights that can be enforced in American courts. For example, a State Department legal adviser submitted written testimony on the Convention to the Senate Committee on Foreign Relations on October 7, 1969. The statement indicated that "[t]he Vienna . . . Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." *Id.* The Department's testimony also emphasized the Vienna Convention's preamble, which states explicitly that the treaty's purpose is "not to benefit individuals." S. EXEC. DOC. E app., 91-1, at 46 (1969).

Senate Committee on Foreign Relations Chairman William J. Fulbright's report to the Senate highlighted the treaty's preamble and then listed five factors that helped secure the Committee's approval. The very first such factor was the Committee's belief that "[t]he Vienna Convention does not change or affect present U.S. laws or practice." S. EXEC. DOC. E app., 91-1, at 46 (1969). That statement of Senate intent would be incomprehensible if the treaty were in fact understood to create individual rights that could abrogate U.S. statutes and the procedural-default rule across the criminal justice system.

In short, Medellín's claim that the Vienna Convention provides him an individual right to challenge the validity of his conviction in American courts conflicts with the plain text of the treaty, the ratification history, and the subsequent State Department interpretation. International agreements, even those directly benefitting private persons, generally do not create private rights or causes of action in domestic courts. Neither the text nor the history of the Vienna Convention overcomes this presumption.

B. ICJ Decisions, Such as *Avena*, Do Not Constitute Self-Executing Federal Law.

From the proposition that the Vienna Convention is "self-executing," Medellín's syllogism goes on to assert that the Optional Protocol must be as well. But there is no basis for finding either the Optional Protocol (a separate and distinct treaty) or the specific judgments of the ICJ to

be themselves self-executing in the sense that they would be judicially enforceable in domestic courts. Nor do Medellín and his *amici* provide any.

For example, after discussing at length why the Vienna Convention is self-executing (in the sense that it requires no implementing legislation), *amici* International Law Experts make the whole of their argument in one conclusory sentence, without authority: "Because *Avena* specifies what is required by the Vienna Convention itself as a remedy for breaches, all aspects of the present petition are properly understood as implementation of a self-executing treaty obligation." Int'l Law Experts Br., at 22.

Likewise, Medellín contends that the *Avena* judgment, because it interprets the Vienna Convention under the Optional Protocol, itself constitutes the "supreme Law of the Land" under the Supremacy Clause. Pet'r Br., at 38-40. However, the decisions and actions of international tribunals like the ICJ are not directly encompassed within the Supremacy Clause. ICJ rulings are not themselves "treaties," nor do they fall within the other two categories of supreme federal law – the "Constitution" and the "Laws of the United States." U.S. CONST. art. VI, cl.2. At best, decisions of the ICJ are indirectly linked to the Supremacy Clause by virtue of the underlying treaty commitments of the United States. But none of the relevant treaty commitments – the U.N. Charter, ICJ Statute, Vienna Convention, and the Optional Protocol – convert the decisions of the ICJ into self-executing federal law. Therefore, *Avena* standing alone cannot create any individually enforceable right in American judicial proceedings.

1. The scope of the ICJ's jurisdiction is limited to disputes between consenting nations, and its decisions are enforceable only by the Security Counsel.

The U.N. Charter and the ICJ's statute together delineate the scope of the ICJ's authority. The ICJ can hear only disputes between nations, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, ¶1, 59 Stat.

1055 (1945), and then only when those nations have consented to the ICJ's jurisdiction, Vienna Convention, art. 36.[9] ICJ decisions have binding force only between the parties, which must be sovereign nations, and only with respect to the particular dispute, *id.* art. 59. Indeed, the ICJ statute specifies that, in all other instances, decisions of the court have "no binding force." *Id.*

As a result, the ICJ cannot declare individual rights, and its decisions have no *res judicata* effect on disputes between individual persons. *See, e.g.*, *Socobel v. the Greek State*, 30 Avril 1950, 18 I.L.R. 3. ICJ judgments are "final and without appeal," but there is no rule regarding the application of those decisions before other tribunals. ICJ STATUTE art. 60.

Nor does the ICJ have direct enforcement powers. Instead, the Security Council enforces ICJ judgments in its discretion. Article 94 of the U.N. Charter provides:

> "1. Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.
>
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, *if it deems necessary*, make recommendations or decide upon measures to be taken to give effect to the judgment." U.N. CHARTER art. 94 (emphasis added).

Thus, while there exists in principle an obligation to respect the ICJ's judgments, ultimate enforcement power is given not to the ICJ – which in effect has authority merely to make declarations that include the scope of damages resulting from a breach of international law –

[9] U.N. members have the option of submitting to the Court's full "compulsory jurisdiction" under article 36(2), or subject to specific reservations under article 36(3). Otherwise, jurisdiction can be by special agreement or by treaty under article 36(1).

but to the Security Council which exercises the political and institutional authority to enforce the ICJ's decisions.

Significantly, no nation has ever inferred from Article 94(1) an obligation to enforce ICJ decisions as domestic law.[10] Indeed, this interpretation of the enforceability of the ICJ's decisions in U.S. courts was expressly rejected by the D.C. Circuit in *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (CADC 1988) (Mikva, J.) (quoting *Diggs v. Richardson*, 555 F.2d 848, 851 (CADC 1976)): "[T]he words of Article 94 'do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.'"

The ICJ's statute confirms that *Avena* does not create rights judicially enforceable by Medellín. The ICJ's decisions have binding force *only* between the parties and with respect to their particular case. *See* ICJ STATUTE art. 59. Only nations may be parties in cases before the ICJ, *id.*, at art. 34, para. 1. Neither Medellín nor Respondent Dretke were parties to *Avena*. Therefore, although Medellín's case is discussed in *Avena*, the ICJ statute precludes *Avena* from creating any binding obligation as between Medellín and the United States or between Medellín and Respondent. *See Comm. of United States Citizens Living in Nicaragua*, 859 F.2d, at 938 (Articles 92 and 94 of the U.N. Charter "make clear that the purpose of establishing the ICJ was to resolve disputes between national governments. We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government."); *see also Socobel*, 18 I.L.R. 3 (ICJ judgments cannot have *res judicata* effect in domestic courts because there is no

[10] Although many foreign cases are unreported, the only case Respondent's research has uncovered where a domestic court applied an ICJ decision was in French-controlled Morocco (a legal entity no longer extant). *See Administration des Habous v. Deal*, 19 I.L.R. 342 (Morocco, Ct. App. Rabat. 1952) – a decision later rejected by a tribunal in French-controlled Tunisia, *see Mackay Radio & Tel. Co. v. Lal-la Fatma Bent si Moahamed el Khadar et al.*, 21 I.L.R. 136 (Tangier, Ct. App. Int'l Trib. 1954).

identity of parties); *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F.R.D. 280, 290-91 (D.D.C. 1952) (refusing to give controlling effect to ICJ ruling).[11]

2. Although the Optional Protocol confers jurisdiction, it does not convert the ICJ's decisions into self-executing federal law.

Medellín's reliance on the Optional Protocol as a basis for compelling domestic judicial enforcement of *Avena* is misplaced. The Optional Protocol, a separate and distinct international instrument from the Convention, provides,

> "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ] and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON CONSULAR RELATIONS CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES, Apr. 24, 1963, 21 U.S.T. 77 (138a).

Medellín argues, in effect, that the ICJ's jurisdiction to interpret and apply the Vienna Convention under the Optional Protocol must include the authority to compel domestic courts of member nations to enforce its decisions. Neither the language, legislative history, nor the application of the Optional Protocol support this contention.

First, the text of the Protocol contains no language indicating that ICJ decisions are enforceable in the domestic courts of member nations. Such an interpretation

[11] *See also Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 157 n.24 (CA2 2003) ("[A]lthough the Charter of the United Nations has been ratified by the United States, it is not self-executing."); *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353, 363 (CA5 1981); *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 100 (CA9 1974) (Trask, J., concurring).

would contravene the plain directive of the U.N. Charter that it is the Security Council, not the domestic courts of member states, that has discretion to enforce ICJ decisions. U.N. CHARTER art. 94.

Second, the limited ratification history concerning this aspect of the Optional Protocol is inconsistent with Medellín's position. Indeed, a representative of the State Department explained in testimony before the Senate, "[i]f problems should arise regarding the interpretation or application of the [Vienna Convention], such problems would probably be resolved through *diplomatic* channels." Vienna Convention on Consular Relations, S. EXEC. REP. No. 91-9, at 19 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration) (emphasis added). Mr. Lyerly further observed that "parties to the optional protocol may agree to resort to . . . an arbitral tribunal" or conciliation. *Id.* And the State Department made clear that nothing related to the Convention was intended in any way to change U.S. laws or practice. *See* S. EXEC. DOC. E, 91-1, at V.

Finally, applying *Avena* as a "rule of decision" would require the Court to accept Medellín's implicit contention that the ICJ has the authority to overrule this Court's precedent and create federal law. There is no evidence that any other state party regards ICJ decisions under the Optional Protocol as controlling over contrary decisions of their highest domestic courts, or that the Optional Protocol even purports to create self-executing domestic law.

3. Treating *Avena* as a "rule of decision" would create untenable conflicts with the AEDPA and established doctrines of criminal procedure.

Avena purports to require judicial review and reconsideration, regardless of any procedural bars under United States law, not only of Medellín's case and those of 50 other Mexican nationals, but also of any other "foreign

nationals finding themselves in similar situations in the United States." P.A. 261a-64a, 268a-69a.[12] Thus, the "rule of decision" that Medellín contends must be derived from *Avena* would on its face require judicial "review and reconsideration" of – at a minimum – every death penalty case in the United States in which violations of the Vienna Convention may have occurred, and would possibly extend even further to the many thousands of foreign nationals incarcerated for other crimes. And, each review would, under *Avena*, be irrespective of any procedural bars and, under Medelíin's theory, the AEDPA.

Because *Avena* is, by its terms, so expansive, its acceptance as a "rule of decision" binding on U.S. courts would necessarily create significant conflicts with, at a minimum, several provisions of the AEDPA, as well as longstanding doctrines of criminal procedure. For example, the proposed "rule of decision" conflicts with the AEDPA's statute of limitations for habeas claims as applicable to at least one of the 51 Mexican nationals whose cases were considered in *Avena*. Under 28 U.S.C. §2244(d)(1), "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in

[12] Disregarding the narrow confines of its jurisdictional statute, the ICJ emphasized the purported breadth of its decision:

> "The Court would now re-emphasize a point of importance. . . . To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. *In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.*" P.A. 268a-69a. (emphasis added).

custody pursuant to the judgment of a State court." Cesar Robert Fierro Reyna, whose case was considered in *Avena*, has already been barred from any further review of his case by the controlling statute of limitation provisions of §2244(d)(1). *Fierro v. Cockrell*, 294 F.3d 674 (CA5 2002), *cert. denied*, 538 U.S. 947 (2003). Nonetheless, *Avena* purports to require that Fierro's case be reviewed and reconsidered by U.S. courts based upon its interpretation of the Vienna Convention. P.A. 196a-98a, 243a-45a, 271a-73a.

Other provisions of the AEDPA would likely be affected as well. Such conflicts are virtually inevitable because *Avena* specifies that it applies broadly to any foreign nationals "in similar situations." P.A. 269a. For example, as in *Breard*, any number of cases purportedly subject to the *Avena* "rule of decision" may involve inmates who have failed to develop the factual basis of their Vienna Convention claim in state court. *See Breard*, 523 U.S., at 376. The Court held, "Breard's ability to obtain relief based on violations of the Vienna Convention *is subject to this subsequently enacted rule* [the AEDPA], *just as any claim arising under the United States Constitution would be.*" *Id.* (emphasis added); 28 U.S.C. §2254(a), (e)(2). Accepting Medellín's contention that *Avena* constitutes a binding rule of decision on American courts would thus likely conflict with §2254 in any case, like *Breard*, where the foreign national has failed to develop the factual basis of his claim in state court.

In addition to invalidating the application of the AEDPA, Medellín's suggestion that the Court should recognize *Avena* as a binding rule of decision would also abrogate well-established doctrines of criminal procedure. As discussed in Section I, *supra*, the application of *Avena* as a rule of decision requires overruling *Breard* and ignoring *Teague* for any foreign national "similarly situated" to Medellín or any of the other 50 Mexican nationals in *Avena*. *See* P.A. 268a-69a.

Given that the AEDPA, procedural default, and *Teague* all apply to *constitutional* claims, it would be passing strange to accede to Medellín's suggestion that, under *Avena*, claims under the Vienna Convention – which is on par with statutes, and which Medellín's *amici* analogize to *Miranda* warnings, Int'l Law Experts Br., at 8 – should somehow be uniquely exempt from the ordinary strictures of criminal law.

4. The Court should not defer to the ICJ based upon any presumption that it has expertise in treaty interpretation.

Medellín's argument concerning the effect of *Avena* can be bifurcated into two aspects: an expansive version, and a weak version. The first, to which he devotes the vast majority of his efforts, is that *Avena* constitutes a binding "rule of decision" enforceable in U.S. courts. The second, to which he and his *amici* allude elliptically, is that even if *Avena* is not binding, it should be accorded deference as a determination of the expert body charged with interpreting the Convention – a notion somewhat akin to *Chevron* deference. *See Chevron, U.S.A. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984). Neither theory is availing.

As an initial matter, because a treaty is federal law, this Court has full competence to construe it according to its terms – and need not look to a foreign tribunal for guidance. *See, e.g., El Al Israeli Airlines*, 525 U.S., at 167-68 (construing rule of decision provided in Warsaw Convention); *cf. Hagen v. Utah*, 510 U.S. 399, 422-23 & n.1 (1994).

Additionally, while the ICJ's work often concerns treaties, it is tied to no political decision-making process – and to none of the accompanying political responsibilities – that would ensure that these "experts" had been given legitimate authority to impose their conclusions. *See Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2761 (2004) (the Court's authority to recognize legal standards arising in international law is limited to objectively established standards because the Court otherwise has no authority to

adopt policy); *cf. id.*, at 2771-72 (Scalia, J. dissenting) (arguing that this standard is too lenient because it still gives courts authority to create law).

And, as with *Chevron* review, deference is unwarranted where the proffered interpretation conflicts with the plain text. Here, the ICJ disregarded the express text of the Convention that it creates no individual rights, and did not even purport to reconcile its far-reaching interpretation with conflicting domestic law, instead simply sweeping the latter aside. Its judgment should be given due respect, but that decision should not control this Court's independent assessment of binding U.S. law.

C. Fulfilling Treaty Obligations Under Article 36 Is the Task of the Political Branches.

1. The implementation of the Vienna Convention is outside the appropriate scope of judicial review.

As the Court has long recognized,

> "the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and long have been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Airlines v. Waterman SS Corp.*, 333 U.S. 103, 111-12 (1948).

Because the specific remedy Medellín seeks – the imposition of "review and reconsideration" of his conviction despite controlling state law and the AEDPA – appears to be judicial, Medellín argues that it should be implemented by the judiciary without regard to the

political branches. Medellín ignores the fact that the Convention is an agreement between nations, not a statutory enactment benefitting individuals. A country considering itself harmed by congressional enactment following a treaty may "present its complaint to the executive head of the government. . . . The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance." *Whitney*, 124 U.S., at 194.

Nor is the judiciary well suited to determine how the United States should act under a treaty, because the United States has discretion to disregard treaty obligations: the President has the power to waive treaties, *Charlton v. Kelly*, 229 U.S. 447, 475-76 (1913), and Congress may enact inconsistent legislation, *Whitney*, 124 U.S., at 194. Moreover, the Executive branch is best-suited to foresee the implications of its actions regarding treaties because the State Department maintains diplomatic contacts throughout the world. The choice of the best manner in which to fulfill a treaty – or, in the alternative, whether to negotiate for a lesser obligation or even to withdraw from an obligation entirely – is by necessity "delicate" and "complex." As a prudential matter, the courts should not interfere in the process.

2. To hold that the political branches could have vested the ICJ with power to determine both state and federal law would raise serious constitutional concerns.

"The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, §1. As Justice O'Connor has explained,

> "the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in the United States. Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power.'" *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 42 (1996) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)).

Accepting Medellín's argument that the treaty obligations of the United States have, in effect, vested in the ICJ the power to create federal law would raise precisely those fundamental separation-of-powers questions.

Post-*Breard*, the only new development that Medellín can point to is that another body, the ICJ, has given its interpretation of a federal treaty. If that interpretation supersedes this Court's – especially in a criminal case or controversy such as the instant proceeding – then necessarily the ICJ would be exercising judicial power.

The most fundamental component of the "judicial Power" discussed by the Constitution is the duty to be the final arbiter of the interpretation of federal law. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Under Medellín's interpretation, as a result of signing the Vienna Convention, "[t]he judicial Power of the United States" has been, at least in some instances, placed not in "one supreme Court," as the Constitution requires, but instead divided between this Court and the ICJ. But whether acting alone or in concert, neither the President nor the U.S. Congress can accomplish such a result. Such a fundamental shift in the vesting of American judicial power cannot be accomplished without constitutional amendment.

Indeed, this prohibition has its roots in *Hayburn's Case*, 2 Dall. 409 (1792), "which stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut*, 514 U.S., at 218. Given the exacting scrutiny that this Court has focused upon *domestic* non-Article III tribunals assuming judicial power, it is difficult to understand how

foreign non-Article III tribunals could stand in any better stead.

Nothing in the President's foreign-affairs and treaty power allows a reordering of the judicial functions of the Article III courts that would otherwise be barred by the Constitution. "[A] treaty cannot change the Constitution or be held valid if it is in violation of that instrument. This results from the nature of and fundamental principles of our government." *The Cherokee Tobacco*, 78 U.S. 616, 620-21 (1870); *see also Reid*, 354 U.S. at 17 ("The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined."); *Boos v. Barry*, 485 U.S. 312, 324 (1988) ("[N]o agreement with a foreign nation can confer power on the congress, or on any other branch of Government, which is free from the restraints of the constitution.").[13]

To allow a delegation or usurpation of the judicial power would inevitably lead to "the encroachment or aggrandizement of one branch at the expense of the other." *Schor*, 478 U.S., at 850-51 (quoting *Thomas v. Union Carbide Agric. Prod.*, 473 U.S. 568, 582-83 (1985), and *Buckley v. Valeo*, 424 U.S., at 122).

Accepting Medellín's interpretation of the authority of the ICJ would also raise serious concerns under the Appointment's Clause. U.S. CONST. art. II, §2, cl.2.[14]

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[13] In *Dames & Moore v. Regan*, the Court approved of the Iran-American Claims Tribunal, but only because arbitrating all claims regarding the Iranian revolution was a significant part of the "bargaining chip" with which the President was able to unravel the underlying diplomatic dispute. 453 U.S. 654, 673 (1981). And there, if the legal principles applied by the arbitral panel – as opposed to the monetary awards confirmed – would control in U.S. courts, it, too, would have violated Article III.

[14] The Appointments Clause provides, "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme court, and all other Officers of the United States, whose appointments are not herein otherwise provided for . . . but the Congress may by Law vest the Appointment of such

(Continued on following page)

A fundamental part of the Constitution's separation of powers, the Appointments Clause protects the President's Article II prerogatives, and is intended to ensure that "any appointee exercising significant authority pursuant to the laws of the United States" will be selected by the President and, where necessary, confirmed by the Senate. *Buckley*, 424 U.S., at 126. Under Medellín's interpretation, the members of the ICJ will be permitted to wield significant, indeed with respect to the Convention, supreme, authority concerning the laws of the United States, without ever having been chosen by the President as required by the Appointment's Clause.[15] Nor will they have been confirmed by the Senate, as would be required to wield the "judicial Power" of the United States that is vested with the "Judges of the supreme court." U.S. CONST. art. III & II, §2, cl.2.[16]

Settled principles of treaty construction obligate the Court to avoid the constitutional conflict that would be occasioned by Medellín's proposed interpretation.[17] "Federal statutes are to be so construed so as to avoid serious

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inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[15] Although the U.S. has always had a representative on the ICJ, ICJ judges are elected by a majority vote of the Security Council and General Assembly, *see* ICJ STATUTE arts. 3, 4, 8, 10, after nomination following consultation with the "highest court of justice" and the nation's law schools, *id.* art. 6.

[16] This concern is heightened by the potentially political nature of ICJ review. *See La Grand* (Separate Opinion of Vice President Shi, ¶17) (recognizing that the judgment is erroneous, but voting for review and reconsideration because the death penalty is of a "severe" and "irreversible nature"); *id.* (Separate Opinion of Judge Oda, ¶9) ("I would hazard a guess that the German Government was prompted to bring this case . . . by the emotional reaction on the part of some people there – where the death penalty has been abolished – to a case involving the existence and application of the death penalty in the United States.").

[17] *See* A. Mark Weisburd, *Problems with the Concept of "Vertical Conflicts,"* 96 AM. SOC'Y INT'L L. PROC. 42, 43-44 (2002); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1570-72 (2003).

doubt of their constitutionality." *Machinists v. Street*, 367 U.S. 740, 749 (1961). The same canon of constitutional avoidance has always applied to treaties as well. *See Murray v. the Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, if it is "fairly possible" to construe a statute or treaty without contravening the Constitution, the Court should do so. *Schor*, 478 U.S., at 841.

Because of their express language, the international instruments on which Medellín relies can be fairly construed not to raise a constitutional issue. The Vienna Convention creates an obligation on the United States to offer consular notification. The United States's failure to comply is an issue for the political branches to address, either directly with a foreign nation or under Article 94 of the U.N. Charter through the political process.

D. Medellín Has Other Avenues to Seek Remedies for Article 36 Violations.

A decision by this Court rejecting Medellín's request for a COA would not eliminate all recourse regarding his case or those of the other Mexican nationals discussed in *Avena*. As the State Department has explained, "[t]he remedies for failures of consular notification under the Vienna Convention are diplomatic, political, or exist between states under international law. *See* State Department *Li* Answers, at A-1, A-3. There are at least four alternative methods of seeking enforcement of *Avena* which do not improperly create individual rights under the Vienna Convention or expand the ICJ's authority at the expense of U.S. sovereignty. First, Mexico, the actual party to *Avena*, could work with the U.N. Security Council, as contemplated by Article 94, to apply *Avena*. Second, Mexico could pursue direct diplomatic initiatives with the United States to implement *Avena*. The third and fourth options, also most likely achieved through Mexico-U.S. diplomacy, would be the enactment of appropriate legislation addressing *Avena* or, alternatively, an Executive Order to achieve the same goals.

Because the U.N. Security Council is specifically tasked with enforcing, at its discretion, ICJ decisions, U.N. CHARTER art. 94(2), that is the most direct avenue for Mexico to seek implementation of *Avena*.

The avenue of diplomacy is also appropriate. The President is under a constitutional duty to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §3. As a duly ratified treaty, the Vienna Convention is undoubtedly the "supreme Law of the Land." U.S. CONST. art. VI, cl.2. As the executive of the national government, the President enjoys preeminence in conducting the foreign relations of the United States. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). Accordingly, working with Mexico and within the Executive Branch to implement *Avena* and enhance compliance with Article 36 is well within the duties and responsibilities of the President. Alternatively, diplomatic initiatives between the United States and Mexico could lead to the enactment of appropriate legislation by Congress implementing *Avena*.

IV. THE ICJ'S DECISIONS IN *LAGRAND* AND *AVENA* ARE NOT ENFORCEABLE UNDER COMITY AND ARE INCONSISTENT WITH UNIFORM TREATY INTERPRETATION.

Medellín alternatively asks that, because the ICJ is an international court, the Court defer out of "comity." But comity is not automatically extended to foreign tribunals *qua* tribunals; instead, it is a voluntary observance of the right of foreign nations to regulate their own affairs. *See Hilton v. Guyot*, 159 U.S. 113, 166 (1895). Applying comity is "a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another." *Somportex Ltd. v. Philadephia Chewing Gum Corp.*, 453 F.2d 435, 440 (CA3 1971). Medellín's comity argument fails for three reasons.

First, a plea to "comity" is not enough to empower the Court to set aside the requirements of the AEDPA. Unless unconstitutional or modified by subsequent statute, the AEDPA provides the governing standard for habeas review, which the Court is obliged to apply.

Second, comity applies to the ability of foreign tribunals to regulate legal affairs within foreign nations. *Avena* does not purport to do so; instead, it expressly reaches across U.S. national borders and applies exclusively within the United States. Because the ICJ was not interpreting an application of foreign law to foreign citizens in a foreign jurisdiction – the basic predicate for comity – there is no basis for the Court to defer to the ICJ's judgment about U.S. treaty law.

And third, comity is particularly inappropriate with respect to *Avena* and *LaGrand*, since both decisions swept aside U.S. statutory provisions and this Court's binding precedents. A fundamental tenet of comity is that it be reciprocal, and the *Avena* and *LaGrand* judgments reflect little respect on the ICJ's part for U.S. law.

Finally, Medellín asserts that *Avena* "should govern in the interest of uniform treaty interpretation." Pet'r Br., at 48. But applying *Avena* would frustrate, not further, uniform treaty interpretation, for two reasons.

First, at the time *LaGrand* was decided in 2001, according to the State Department, no country in the world had interpreted the Vienna Convention to create individual rights or ordered reconsideration of a criminal conviction based on a violation of Article 36.[18] Thus, *LaGrand* itself rejected the prevailing, uniform interpretation of the Convention, for the first time finding in the text

[18] After a comprehensive investigation into international practice, the State Department "found no indication that other states party have remedied such failures by granting remedies in the context of their criminal justice proceedings." State Department *Li.* Answers at A-8, A-9 (commenting that no party had produced a single example of a nation providing a judicial remedy for Article 36 violations); *see also Avena*, Counter-Memorial of the United States, at 288-90 (Mexico failed to provide a single example of a state practice of reconsidering convictions based on consular-notification); *Canada v. VanBergen*, 261 A.R. 387, 390 (2000) (rejecting legal challenge to extradition from Canada based on Article 36); *R. v. Abbrederis*, [1981] 36 A.L.R. 109, 122-23; *Re Yater*, "Judicial Decisions," 1976 Ital. Y.B. Int'l Law, at 336-39, Vol. II (decided by Italy's Court of Cassation Feb. 19, 1973).

of the Convention an individual right that no member nation had understood to exist – and then further discovering that such right was enforceable in the domestic courts of a member nation.

Second, there is no indication that international practice regarding the Convention has changed since *LaGrand* and *Avena*. At least two courts have refused to apply the *LaGrand* decision as a basis for revisiting a conviction – including a court in Germany itself, the party that brought *LaGrand* in the first place. *See* BGH 5 StR 116/0 decided on 7 Nov. 2001, *available at* http://www.bundesgerichtshof.de (Germany); *see also R. v. Partak*, [2–1] 160 C.C.C. (3d) 553, 570 (Canada).[19]

Thus, Medellín asks the Court (1) to diverge from the international consensus that the Convention provides no individual rights, and (2) to become the first court in the world to accord binding authority to an ICJ judgment in domestic tribunals. Doing so would not advance uniform treaty interpretation; instead, it would undermine, and potentially unravel, uniformity.

[19] In fact, even Mexico's litigation posture in *Avena* was a reversal of its traditional position on the subject. The 1976 Treaty on the Execution of Penal Sentences, Nov. 25, 1976, Mex.- U.S., 28 U.S.T. 739, at Mexico's explicit insistence, provides for enforcement of Mexican convictions with no mention of Mexico's article 36 violations. Mexico, in recognizing its own poor record in complying with article 36, stated that "we cannot ... expect that irregularities will not occasionally be committed." Letter from Alfonso Garcia Robles, Foreign Minister of Mexico, to Henry A. Kissinger, Secretary of State of the United States of America (Mar. 25, 1976). Mexico's federal law governing consular-notification provides no judicial remedy for individuals, only a consular-notification requirement. LEYES Y CODIGOS DE MEXICO, C.F.P.P., art. 128.IV (1995) ("Si se tratare de un extranjero, la detencion se comunicara de inmediato a la representacion diplomatica o consular que corresponda." ("In the case of an alien, the fact that he has been placed in custody shall be reported immediately to the appropriate diplomatic or consular mission.")).

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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